HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER.

COVENANTS RUNNING WITH THE LAND ENFORCEABLE IN EQUITY. — At common law in England the burden of covenants running with the land does not pass to an assignee of the covenantor. Nevertheless, if the assignee takes without value or with notice of the covenant, equity will enforce the burden against him, usually without regard to whether or not the covenant fulfills the requirements of covenants running with the land at law.[1] It is well settled in England, however, that the jurisdiction of equity extends only to restrictive covenants, and that the courts will not enforce affirmative agreements against any one but the original covenantor.[2] By the common law rule as often stated in this country the burden and the benefit of covenants running with the land pass respectively to the assignees of the covenantor and of the covenantee.[3] Accordingly the Appellate Court of Indiana has recently decided that the plaintiff who conveyed land to a railroad which had covenanted to build and maintain fences along its right of way, may recover at law against the assignee of this railroad for breach of these covenants. *Chicago & S. E. R. R. Co.* v. *McEwen*, 71 N. E. Rep. 926 (Ind., App. Ct.).

In view of this difference in the law it may well be asked whether our courts of equity will follow the English rule of enforcing only restrictive agreements. It must be clear that wherever, as in the Indiana case, the

[1] Tulk *v.* Moxhay, 2 Ph. 774.
[2] Austerberry *v.* Corporation of Oldham, 29 Ch. D. 750.
[3] Midland R. R. Co. *v.* Fisher, 125 Ind. 19 (covenant to fence); Fisher's Executors *v.* Lewis, 1 Clark (Pa.) 422 (covenant to build); Gilmer *v.* R. R. Co., 79 Ala. 569 (covenant to build flag-station); Sims, Covenants 148.

plaintiff may get damages for the breach of an affirmative agreement he must have also a right to specific performance, subject only to the ordinary limitations of equity in enforcing contracts which require affirmative acts on the part of the defendant. Thus a covenant to build and repair a fence has been enforced specifically against a grantee of the covenantor on the ground that he was liable at law.[4] In these cases equity has concurrent jurisdiction, and they can accordingly be distinguished from the English cases, for while under the English view notice or absence of value is essential to charge the defendant, here neither is of importance because he is already charged at law.[5] Of course wherever the covenant is such that it can run only in equity the rules of the English courts in regard to notice and value would apply. But it is doubtful whether even in such cases the American courts will confine themselves to the enforcement of restrictive agreements only. The basis of enforcing such agreements at all against the assignee must be that as he took the premises with full notice of the covenant, he probably paid less for them than would otherwise have been the case, and if he were now allowed to escape the obligation, he would be unjustly benefited at the expense of the covenantee.[6] It is hard to see why this argument does not equally apply to the enforcement of affirmative as well as negative covenants. It may be said that in the case of an affirmative covenant the promisee still has his remedy against the original promisor; but it is at least doubtful whether the same be not true of a restrictive agreement.[7] A more probable explanation of the English rule is to be found in the hesitation which courts of equity for a long time felt in compelling a defendant to do affirmative acts in the performance of a contract. If the English rule can be regarded as arising from this erroneous notion of the power of a court of equity, and not as resulting from any peculiar circumstances surrounding these covenants, there would seem to be no reason for adopting it in this country.[8]

THE REQUIREMENT OF ACTUAL NOTICE TO NON-RESIDENT DEFENDANTS IN DIVORCE PROCEEDINGS. — Although it seems highly desirable that uniform rules concerning the extra-territorial validity of divorce decrees should be applied in the various states, there exists in that branch of American law no little confusion, due to the conflicting conceptions which the different courts have held as to the real nature of divorce proceedings. The view formerly held in New York and a few other states that such proceedings are proceedings *in personam* requiring personal service within the state in order to affect the status of the defendant has been rendered untenable by a decision of the Supreme Court of the United States.[1] The New Jersey doctrine, which has found considerable support in the courts of other states and among the text-writers,[2] apparently recognizes that the proceedings are not strictly *in personam*, but assumes that they partake to some extent of that character. Consequently, as is shown by a recent case, it is

[4] Countryman *v.* Deck, 13 Abb. New Cas. 110.
[5] *Ibid.*
[6] 17 HARV. L. REV. 176.
[7] *In re* Poole & Clarke's Contract, [1904] 2 Ch. 173.
[8] Bald Eagle, etc., R. Co. *v.* Nittany, etc., R. Co., 171 Pa. St. 284. See Lydick *v.* B. & O. R. R. Co., 17 W. Va. 428.

[1] Atherton *v.* Atherton, 181 U. S. 155.
[2] Minor, Conflict of Laws § 94.